IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [illegible]

WHDH, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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Respondents' basic contention seems to be that since the court below decided nothing, it cannot have decided anything erroneously. The Commission's brief (p. 11) concedes that the court below would have been required

to afford petitioner a hearing had its order approving the Commission's Report and Recommendations constituted a holding that such findings were correct. The Commission's position is that the court below had alternative procedures open to it when presented with the Commission's "findings": (a) to give petitioner (and the other parties) a hearing on the question of whether there is any legal or factual basis in the remand record for vacating the Commission's 1957 award to petitioner; or (b) to vacate the order summarily without making any determination as to whether there is either a legal or factual basis in the record for so doing. The court followed the latter course which the Commission characterizes as "in accord with 'familiar appellate practice to remand causes for further proceedings without deciding the merits,' . . ." (Br. p. 10).

No precedent has been cited to support the contention that it is "familiar appellate practice" to vacate an administrative order granting a license or permit, without notice or hearing to the permittee, solely on an *ex parte* representation that the agency involved would like to give the issuance of the permit further consideration. In every case cited in the Commission's brief and in every other case we have been able to find, remands to the FCC for consideration of newly discovered evidence have been made only after hearing contentions of the interested parties concerning the existence of the alleged new facts and their significance. The action of the court below in the instant case in accepting respondent Commission's representations and refusing to hear petitioner with respect to such representations and refusing to consider the record on

which the Commission's representations were allegedly based is unprecedented.[1]

The order of the court below cannot be insulated from this Court's review by the device of characterizing it as "interlocutory". A judgment entered summarily is no less final than a judgment entered after hearing. Only be assuming that the proceedings in the court below were part of the administrative process as distinguished from the judicial process can the court's order correctly be termed "interlocutory". The adminstrative process ends and the judicial process begins when an appeal from a Commission order is filed in the court below (47 U.S.C. 402(c)) and the judicial process ends (except for review in this Court) when the court below enters an order disposing of that appeal (47 U.S.C. 402(j)). The jurisdiction of the court below is limited, this Court has said, to judicial as distinguished from administrative functions and review by this Court

[1] The Commission brief (p. 14) attempts to distinguish the court's action in calling for briefs and scheduling oral argument in the Miami Channel 10 proceeding on the ground that in that case "no further Commission proceedings were contemplated". The Commission does not, however, advert to the order of the court below to the same effect entered in *Sangamon Valley Television Corp. v. United States of America* and *Federal Communications Commission, et al.*, No. 13,992 on April 17, 1961 (reprinted as an appendix hereto). In the *Sangamon* case, hearing was ordered notwithstanding request by the Commission to follow the procedure first utilized in this case, i.e., entry of an order terminating the judicial proceedings in the court below and remanding to the Commission for further administrative proceedings without consideration of the record and without hearing the parties. The fact remains that whatever may be the differences in the various cases, the one consistent thread running through all of them except this one is that the court has afforded a hearing to the parties before taking final action on the appeal, as it did in this case by its January 19th order.

is limited to a determination of whether the court below properly exercise the limited judicial function conferred on it in appeals taken under Section 402(b) of the Commmunications Act (*Nelson Bros.* v. *Federal Communications Commission,* 289 U.S. 266, 276). The order of the court below vacating the Commission's order on appeal is no more interlocutory than was the "final action" of the Court of Appeals for the Sixth Circuit "in remanding the cause for further proceedings to the Board" which was the subject of this Court's review in *Ford Motor Company* v. *National Labor Relations Board,* 305 U.S. 364, 370. The necessity for clarifying the confusion between the functions of the court below and those of the Commission epitomized in the description of the court's January 19, 1961, order vacating petitioner's permit as "interlocutory" is perhaps the most important reason for the issuance of the writ in this case.

We concede that it would not have invalidated the court's July, 1958, remand order had that order contained an explicit requirement that the Commission report its conclusions as to whether the remand evidence would require a different comparative award. On the contrary, it has been petitioner's view that such a requirement was in fact implicit in the order. We most certainly do not concede, however, that had the court below in 1958, on the basis of what it read in the pleadings in another case, *vacated* the Commission's order granting petitioner's permit without affording any hearing to petitioner, such action would have been any more valid than is its January 19, 1961, order. The court's 1958 remand order was purely interlocutory. It provided for maintenance of the *status quo* and prohibited any tampering with the Commission's order

granting petitioner's permit. Petitioner suffered no hurt through the holding of hearings or the prosecution of inquiries concerning the existence of any possible impropriety on petitioner's part in the prosecution of its original application. Until the court below acted to disturb the *status quo*, petitioner was in no position to claim injury at its hands.[2]

Scripps-Howard Radio v. *Federal Communications Commission*, 316 U.S. 4, relied on by the Commission to support the court's July 1958 remand is neither analogous nor apposite. This Court held there that the court below had the inherent equitable power of a court of first instance to maintain the *status quo* in dealing with a case questioning the legality of a Commission authorization. The decision contains no suggestion that absent specific statutory authority the inherent equitable power of a court of first instance extends to the direction and supervision of supplementary administrative proceedings related to a matter before it and over which it continues to maintain jurisdiction. In *Ford Motor Company, supra*, the remand order involved was one terminating the court's jurisdiction and reinvesting the Labor Board with administrative jurisdiction. No supervision of subsequent Labor Board proceedings was contemplated.

Judge Stern addressed himself squarely to the question of whether any of the facts developed in the remand proceedings justify a different result in the proceedings before the Commission than was reached in its April, 1957, decision and order granting petitioner's

[2] The court below clearly recognized that the impact on petitioner of alteration of the *status quo* was not merely academic in its October 7, 1960 order (A. 114a), staying the Commission's order of July 14, 1960 (A. 104a), purporting to vacate the Commission's April 24, 1957, order granting petitioner's television application.

television application. He concluded, without qualification, that none of such evidence justifies a different result (A. 64a-65a). The Commission, reviewing Judge Stern, did not address itself to the question of whether the remand evidence justified or required a different result but contented itself with concluding that the evidence justified a new comparative evaluation (A. 90a-104a). As is plain from its representations to this Court, the Commission construes its decision as leaving completely open the question whether the new evaluation will produce the same result as did its original evaluation. The action of the court below, despite this, in summarily vacating the order which it had found the Commmission correctly entered on the record then before it, denies petitioner due process in a radical departure "from the accepted and usual course of judicial proceedings". It is no answer to the violation of petitioner's right to have its award remain in effect unless and until some illegality in it is found, to say that it may again prevail and win a new award in a new proceeding before the Commission.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 13,992

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
Intervenor,

SIGNAL HILL TELECASTING CORPORATION, *Intervenor*,
PLAINS TELEVISION CORPORATION, *Intervenor*.

Before: EDGERTON, FAHY and BASTIAN, *Circuit Judges*, in Chambers.

Order

Upon consideration of the Report and Recommendation of the Commission, submitted to this court February 17, 1961, and of the several memoranda which have been filed with the court regarding that Report and Recommendation, it is

ORDERED by the court that the parties to this case are allowed to file printed briefs setting forth their views regarding the memoranda, the Report and Recommendation and the action they believe the court should take with reference to the Report and Recommendation. Petitioner is allowed 20 days to file its brief. Respondent and intervenors are allowed until 20 days after the filing of petitioner's brief to file their briefs and the matter will be set for hearing as soon after filing of respondents' and intervenors' briefs as the business of this court will permit.

PER CURIAM.

Dated: April 17, 1961

Proof of Service

I, Harry J. Ockershausen, one of the attorneys for WHDH, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on May 2, 1963, I served a copy of the foregoing Reply Brief of Petitioner on The Solicitor General of the United States; Federal Communications Commission, Respondent herein; Massachusetts Bay Telecasters, Inc., Respondent herein; and Greater Boston Television Corporation, Respondent herein, by mailing copies, in duly addressed envelopes, with first class postage (or air mail postage, as indicated) prepaid, as follows:

To: The Honorable Archibald Cox
Solicitor General
Department of Justice
Washington 25, D. C.—first class postage

To: Max D. Paglin, Esq.
General Counsel
Federal Communications Commission
Washington 25, D. C.—first class postage

To: J. Joseph Maloney, Jr., Esq.
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